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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 922

ROSE L. BARKER,
Petitioner,

vs.

CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY, a corporation, and, OCCIDENTAL LIFE INSURANCE COMPANY, a corporation, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Fifth Appellate District

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California Fifth Appellate District

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fifth Appellate District, entered in the above entitled case on July 24, 1967. A rehearing was denied by the Court of Appeal on August

17, 1967. Hearing was denied by the Supreme Court of California on September 21, 1967.[1]

CITATIONS TO OPINIONS AND ORDERS BELOW

The Memorandum Opinion of the trial Court, the Honorable Irving H. Perluss, Judge of the Superior Court of the State of California, in and for the County of Sacramento, is unreported and is printed in Appendix B hereto, *infra;* pp. xiii to xv. The Opinion of the Court of Appeal, Fifth Appellate District, printed in Appendix B hereto, *infra,* pp. xvi to xxxiv, is reported at 252 A.C.A. 832, 61 Cal. Rptr. 595. The Order of the Supreme Court of California, denying a hearing is unreported and is printed in Appendix B hereto, *infra,* p. xxxv.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fifth Appellate District, was entered on July 24, 1967. A timely petition for rehearing, filed on or about August 7, 1967, was denied on August 17, 1967. A timely Petition for a Hearing by the Supreme Court of California was filed on September 5, 1967. Hearing was denied by the Supreme Court of California on September 21, 1967.

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[1]The parties designated as "et al." were identified in the original complaint as First Doe to Tenth Doe, inclusive, and were sued as defendants by such fictitious names. No one has been served with summons as such a fictitious person. No appearance has been made by anyone for or on behalf of any such fictitious person. None such, therefore, is an "adverse party" to this instant Petition for a Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), since in all courts below the rights, privileges and immunities of petitioner under Article I, Section 9(3) and Article I, Section 10(1) of the Constitution of the United States, and the Fifth, Sixth and Fourteenth Amendments thereto (Appendix A, pp. i to ii, *infra*), were timely and properly raised. Also, prior to trial, petitioner, by a motion to strike, unsuccessfully contended that if respondents' Separate and Affirmative Defense was allowed to remain that respondents would thereby be permitted to take advantage of their own wrong, in violation of California Civil Code Sec. 3517 (Appendix A, p. v, *infra*), and, that respondents' Answer and the Separate and Affirmative Defense therein contained were against public policy (C.T. 43a through 43j, and, 44) and denied to petitioner procedural and substantive due process of law under the California Constitution and the Constitution of the United States.

The probable application of the Tenth Amendment and the Fourth Amendment to the Constitution of the United States (Appendix A, pp. i to ii, *infra*), was first raised after trial. The former at page sixty (60) of Appellant's Opening Brief, filed with the Court of Appeal, State of California, Third Appellate District,[2] and the latter at page twenty-nine (29) of the Petition for a Hearing by the Supreme Court of California.

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[2]The case was later duly transferred to the Court of Appeal of the State of California, Fifth Appellate District, after the creation of such Court.

QUESTIONS PRESENTED

First: Can there be the "commission of a felony" by an insured, in violation of California Vehicle Code Sec. 23101 and within the meaning of an exclusionary provision of Supplemental Agreements to contracts of insurance, both of which were contracts of adhesion, between the Department of Veterans Affairs of the State of California and the respondents, when such contracts and Supplemental Agreements are for the benefit of a class of persons of which petitioner, widow of the insured veteran, is a member, if such Supplemental Agreements provide that respondents "shall not be liable for any loss to which the contributing cause was the insured's commission of or attempt to commit a felony", but where the insured veteran had not been charged with, convicted of, nor, sentenced for, the "commission of a felony", he having died *before* such legal processes could be commenced?

Second: (a) In Supplemental Agreements to contracts of insurance, both of which were contracts of adhesion, between the Department of Veterans Affairs of the State of California and respondents, does the failure of respondents to draft their exclusionary provision, concerning the "commission of a felony", so that it will comply with the mandate of California Insurance Code Sec. 10369.11 (Appendix A, p. viii, *infra*), and 10 California Administrative Code Sec. 2232.30, concerning the "words, order and under the captions of the uniform provisions as set forth in Section 2232.40" (Appendix A, p. iv, *infra*), for such exclusionary provisions, deny to petitioner, as a member of a class of persons for whose benefit

such contracts of insurance and Supplemental Agreements were formed, to provide "additional indemnity in event of death by accidental means", due process of law under the Constitution of the United States and the Constitution of California (Art. I, Sec. 13; Appendix A, pp. ii to iii, *infra*), and deny to petitioner the right to be free from the *judicial* equivalent of legislative enactments of bills of attainder, bills of pains, and penalties, ex post facto laws and laws impairing the obligation of contracts (Constitution of California, Art. I, Sec. 16; Appendix A, p. iii, *infra*), thereby preventing respondents from asserting the exclusionary provisions of the Supplemental Agreements, but obligating them to pay petitioner the amout of the double indemnity provided for in such Supplemental Agreements?

(b) Does the second sentence of the Fourteenth Amendment to the Constitution of the United States so embody, or by a process of absorption comprise, or incorporate, in principle, the guarantees of Article I, Sec. 9(3) and Article I, Sec. 10(1) of such Constitution (Appendix A, p. i, *infra*), as to inhibit the judicial arm of the sovereign (the State of California) from permitting a *result* to be accomplished, by virtue of the *judicial decisions of such state* which would be constitutionally impermissible for the *legislative arm* of the same sovereign to accomplish by: a bill of pains and penalties; a bill of attainder; an ex post facto law; or, by a law impairing the obligation of contracts?

(c) Does the erosion, by judicial abstention, of those constitutional guarantees which it is constitu-

tionally impermissible for a legislature to impair, by statute, cause such a gross miscarriage of justice as to violate not only an individual's rights under the Fourteenth Amendment but constitute an erosion of the basic concepts of the separation of powers and the traditions of a constitutional framework of ordered liberty structured by checks and balances?

Third: Is it against public policy and a denial to petitioner of substantive and procedural due process of law and an invasion of petitioner's constitutional guarantees under Art. I, Sec. 9(3), Art. I, Sec. 10(1) of the Constitution of the United States and the Fifth, Sixth and Fourteenth Amendments thereto (Appendix A, pp. i and ii, *infra*), for respondents to benefit from their own wrongs,[3] in violation of California Civil Code Sec. 3517 (Appendix A, p. v, *infra*), at the expense of the members of a class—California Veterans who purchased homes—such wrongs being committed by respondents prior and subsequent to the alleged violation by the insured decedent veteran of California Vehicle Code Sec. 23101 (Appendix A, p. x, *infra*)?

The wrongs from which respondents are seeking to benefit and which petitioner contends are against pub-

[3]Petitioner's attorney believes that he recalls, but he has been unable to find, a case in which Mr. Justice Cardozo said, in an opinion involving a suit against an insurance company for indemnity in the event of total and permanent disability, that there is a principle more nearly ultimate than estoppel and that is that no one can benefit by his own wrong. In that case, if petitioner's attorney's recollection is correct, the Court excused the giving of notice to the company by one who was mentally and physically incapable of so doing, the insurance company being in the wrong in requiring such notice by one so incapacitated.

lic policy and constitute a denial to petitioner of substantive and procedural due process of law and an invasion of his other constitutional guarantees include:

(a) An endeavor by respondents, in negotiating with the Department of Veterans Affairs of the State of California—concerning the rights of Veterans who purchased homes—to "pass off" one type of insurance protection as another. (R.T. 112:7-20; R.T. 115:18-116:1. Pl. Exs. 15A[4] (R.T. 95), 15B (C.T. 66; R.T. 98), and 15D (C.T. 70; R.T. 100).) This is reminiscent of the voice of Jacob but the hand of Esau (Genesis 27:22-24);

(b) Respondents' assertion, under oath, of the defense of no "death by accidental means" (C.T. 11:17-20), requiring opposing counsel to meet it, utilizing the time, facilities and personnel of the trial Court (R.T. 10:6-9; 11:16-19; 11:26-12:6; 12:23-14:11) to hear it, for two (2) days, and, then abandoning such defense (C.T. 98:17-20), although respondents knew at the time they contracted with the State of California the distinction between a policy insuring against "death by accidental means" and one insuring against "accidental death" and had endeavored

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[4]There are two (2) exhibits so marked. One is a letter, dated December 31, 1959, to Mr. J. J. Faber, Attorney and Counsel, State of California, Department of Insurance, from Mr. Marcus Gunn, Vice President and Chief Actuary of respondent, California-Western. This is hereafter referred to as Pl. Ex. 15A-1959. (R.T. 95)

The other is also a letter from the same Mr. Marcus Gunn, but, it is directed to Mr. Joseph M. Farber (the similarity of his name to J. J. Faber's may also cause confusion). It is dated January 28, 1960. Such letter is hereafter referred to as Pl. Ex. 15A-1960. (R.T. 53-56)

at the time they contracted with the State of California to "pass off" the former as the latter.

(c) The admission by the Assistant Secretary (later the Chief Assistant General Counsel) of California Western States Life Insurance Company that several allegations of fact, which he made in the Answer that he verified were not known by him of his own knowledge (C.T. 43F-43J), there being no allegations therein on information and belief.

The alleged violation consisted of driving the wrong way in a one way lane of a freeway, at which time, respondents contend, the insured was under the influence of intoxicating liquor. A collision occurred in which the insured and a passenger in an oncoming car were killed.

Respondents contend such conduct was within the exclusionary provision of Supplemental Agreements which were contracts of adhesion, comprised of many documents, entitled "Additional Indemnity in Event of Death by Accidental Means". Such exclusionary provision read:

> "*Commission of Felony:* The company shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony." (Pl. Ex. 15B, C.T. 66, R.T. 98. Pl. Ex. 15D, C.T. 70, R.T. 100.)

Respondents abandoned their original contention that there was an "attempt to commit a felony" by the insured. (Pl. Ex. 18, p. 4, lines 9-11 and Pl. Ex. 19, p. 3, line 17; R.T. 123.)

Fourth: Was there a denial to petitioner under the Constitution of the United States and the Constitu-

tion of California of substantive and procedural due process of law, by the admission into evidence, of Defendants' Exhibit C, over objection by petitioner, that there was no proper foundation therefor? Exhibit C purports to show an alcohol determination of a *purported* sample of Barker's blood, such admission into evidence being made in reliance upon California Code of Civil Procedure Secs. 1953f. (Uniform Business Records as Evidence Act[5]; Appendix A, p. vi, *infra.*)

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE CODE SECTIONS INVOLVED

Constitution of the United States:

Art. I, Sec. 9(3), Appendix A, p. i *infra.*
Art. I, Sec. 10(1), Appendix A, p. i *infra.*
Fourth Amendment, Appendix A, p. i *infra.*
Fifth Amendment, Appendix A, p. i *infra.*
Sixth Amendment, Appendix A, p. ii *infra.*
Tenth Amendment, Appendix A, p. ii *infra.*
Fourteenth Amendment, Appendix A, p. ii *infra.*

Constitution of California:

Art. I, Sec. 13, Appendix A, pp. ii to iii *infra.*
Art. I, Sec. 16, Appendix A, p. iii *infra.*
Art. VI, Sec. 4½ [Now Art. VI, Sec. 13], Appendix A, pp. iii to iv *infra.*

California Administrative Code Sections:

10 California Administrative Code, Secs. 2232.30, 2232.40 and 2232.41, Appendix A, pp. iv to v *infra.*

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[5]This statute was not in effect after January 1, 1967, Evidence Code Secs. 1270, 1271 and 1272 being substituted therefor. Evidence Code Sec. 12(b) provides that "a trial commenced *before* January 1, 1967, shall not be governed by" the new Evidence Code.

California Civil Code:

Civil Code, Sec. 3517, Appendix A, p. v *infra.*

California Code of Civil Procedure:

C.C.P. Sec. 1918, Appendix A, p. v *infra.*
C.C.P. Sec. 1920, Appendix A, p. v *infra.*
C.C.P. Sec. 1926, Appendix A, p. vi *infra.*
C.C.P. Sec. 1953(f), Appendix A, p. vi *infra.*
C.C.P. Sec. 1962(3), Appendix A, p. vi *infra.*

California Insurance Code:

Ins. Code Sec. 106, Appendix A, pp. vi to vii *infra.*
Ins. Code, Sec. 10271, Appendix A, p. vii *infra.*
Ins. Code Sec. 10369.1, Appendix A, pp. vii to viii *infra.*
Ins. Code Sec. 10369.11, Appendix A, p. viii *infra.*
Ins. Code Sec. 10369.12, Appendix A, p. viii *infra.*

California Penal Code:

Penal Code Sec. 6, Appendix A, pp. viii to ix *infra.*
Penal Code Sec. 15, Appendix A, p. ix *infra.*
Penal Code Sec. 16, Appendix A, p. ix *infra.*
Penal Code Sec. 17, Appendix A, pp. ix to x *infra.*

California Vehicle Code:

Vehicle Code Sec. 23101, Appendix A, p. x *infra.*

Colorado Revised Statutes 1963, Vol. 3:

Sec. 40-2-10, Appendix A, pp. x to xi *infra.*
Sec. 40-2-11, Appendix A, p. xi *infra.*

Texas (Vernon's Annotated Penal Code):

Art. 47, 53-58, Vol. 1, Appendix A, p. xi *infra.*
Art. 802c, Vol. 2, Appendix A, pp. xi to xii *infra.*

STATEMENT OF THE CASE

In March of 1958 the California Department of Veterans Affairs and respondents entered into certain "Home Protection Plan" insurance contracts for the benefit of Veterans.

Under the rule of *MacDonald v. California-Western States Life Ins. Co.* (1962) 203 CA 2d 440, 453-4, 21 Cal. Rptr. 659, 667, petitioner's husband, Lester A. Barker, was an actual party to the insurance plan and the insured and his widow, petitioner herein, were the promisees of the respondents' promise to pay the benefits under the "Home Protection Plan" of insurance.

The distinction between "accidental death" and "death by accidental means" is well known in the insurance business. (cf. *Baciocco v. Prudential Ins. Co. of America, et al.* (D.C.N.D. Calif., S.D. 1927, St. Sure, D.J.) 22 F 2d 700, 701, 702.) This distinction was known to Mr. Marcus Gunn, the Vice President and Chief Actuary of California-Western, at the time the Supplemental Agreement, entered into on January 20, 1960, was negotiated by him with the California Department of Veterans Affairs. (R.T. 112:7-20; 115:18-116:1). Nevertheless, in the letter (Pl. Ex. 15A-1959; R.T. 95; See AOB:3, footnote 1) he wrote to Mr. J. J. Faber, Attorney and Counsel, State of California, Department of Insurance, he stated that a certain Form 1551 (Exhibit 15B C.T. 66; R.T. 98) which he enclosed provides "additional insurance in event of *death by accident*" (emphasis added). However, the enclosed Form 1551 did *not* mention "death

by accident" or "accidental death". It spoke only of "Additional Indemnity in Event of *Death by Accidental Means*" (emphasis added). This, or the comparable Form CV 30 Ed 160 from Occidental (Pl. Ex. 15D; C.T. 70; R.T. 100), is the only document which would ultimately be issued, by respondents, to the policy holder.

However, the Supplemental Agreement consisted of several documents (Pl. Exs. 15A-1959; R.T. 95; 15B, C.T. 66-68, R.T. 98; 15C, C.T. 65, R.T. 99; 15D, C.T. 70-72, R.T. 100; 15E, C.T. 69, R.T. 101 and 15A-1960, R.T. 53-56).

In five (5) separate and distinct places (Exhibits 15C, page 1, C.T. 65, R.T. 99 and 15E, page 1, C.T. 69, R.T. 101) the Supplemental Agreement refers to a "benefit for accidental death" or to an "accidental death benefit".

Two (2) facts bear repetition:

(a) The *only* document (Exhibits 15B, C.T. 66-68, R.T. 98, and 15D, C.T. 70-72, R.T. 100) which the insured would have in his possession, of the several which comprised the Supplemental Agreement, is entitled "Additional Indemnity in Event of *Death by Accidental Means*" (emphasis added).

(b) Such document was the *only one* containing the exclusionary provision in litigation:

> "*Commission of Felony:* The Company shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony."

The benefits purported to be conferred by this document (Exhibits 15B, C.T. 66-68, R.T. 98 and 15D, C.T. 70-72, R.T. 98) were payable if "death resulted directly and independently of all other causes from external, violent and *accidental means*" (emphasis added).

Respondents admitted: (a) that *neither of them notified the insured that the Supplemental Agreement was ever in effect;* and, (b) that Barker's death was the first death, subsequent to January 20, 1960, for which a beneficiary made a claim under such Supplemental Agreement.

Respondents have performed their obligations under the policy and the Supplemental Agreement, except payment of the amount of the double indemnity.

On February 7, 1960, about 1:20 o'clock in the morning, the insured was killed in a head-on collision near Sacramento, California. He was going north in the south bound lane of a Freeway. Visibility was poor in a moderate rain (R.T. 17:9-14) and was about one hundred fifty feet (R.T. 20:18-21:3). The collision occurred near the crest of an inclined (R.T. 18:23-19:4) curve to the right (R.T. 19:14-21) up which the insured was going (R.T. 26:26-27:4; 18:23-19:1). Due to the curvature he wouldn't see the road ahead. (R.T. 19:14-21.) The insured was in the right hand lane for a driver, such as he, who was going the wrong way—i.e., north in the south bound lane. (R.T. 18:9-12; 33:11-16.) A State Highway Patrol Officer testified, "He would have felt he was in the right line" (R.T. 18:9-12; 29:1-5), and that "It would

be a little tight there", at the point of the accident, to turn around (R.T. 38:20-23). When an oncoming car would approach him he would come back into a lane that was clear, either on the left or right hand side. (R.T. 80:19-24.) An eye witness testified that he "kind of picked whatever lane was free, clear." (R.T. 81:25-82:2.) His lights were on at the moment of impact. (R.T. 74:24-75:2.)

A witness who traveled that road at approximately the same time, "almost every night going home from work" five days a week for six years, testified that there was no sign saying "Freeway" on either of the one-way streets providing the flow of traffic in a northerly or a southerly direction for the Freeway. (R.T. 85:10-14; 86:6-21.) "C" Street in Sacramento was the nearest place, to the south, where a person could have gotten on the Freeway to go north, as the insured was going. It was about two miles to the south. (R.T. 30:23-31:4.) At least half a dozen cars, which were going south, passed the insured between C Street and the point of collision. (R.T. 81:19-24.)

The same Highway Patrol Officer, investigating the accident, testified he was within eighteen inches of the insured's body at the scene of the accident and that he did not smell any odor of alcohol nor did he see bottles, cups or glasses about the car. (R.T. 35:12-21; 39:7-20.)

Petitioner's complaint, as amended, alleged breach of contract by respondents, prayed for the sum of $12,859.06, as provided for in the Supplemental Agreement, interest thereon from the date of collision and

costs. Petitioner also prayed for declaratory relief. (C.T. 1-9; 15-43; 51-82.)

(1) Federal Questions and Issues of Public Policy Were Raised by the Pleadings, by Motion to Strike and at the Pre-Trial Conference and Were Ruled Upon Adversely to Petitioner.

Petitioner's complaint, as amended (C.T. 61:29-62:10), alleged that the refusal of respondents to pay the aforementioned sum:

> "(a) Disregards the provisions of Sections 6, 15, 16 and 17 of the Penal Code of the State of California;
>
> (b) Is contrary to and in violation of the U.S. Constitution, Art. I, Sec. 9(3) and the 14th Amendment thereto;
>
> (c) Constitutes a denial to plaintiff of substantive and procedural due process of law under the Fifth (5th), Sixth (6th) and Fourteenth (14th) Amendments to the U.S. Constitution and under Article I, Section 13 of the Constitution of the State of California;
>
> (d) Is contrary to the public policy of the State of California and the United States of America."

Respondents' original Answer, verified on June 27, 1962 by Mr. Joseph S. Heston, the Assistant Secretary of California-Western, alleges that they contend:

> "[T]hat the death of Lester A. Barker did not result directly and independently of all other causes from accidental means and further that a contributing cause to the death of Lester A. Barker was his commission of or attempt to commit a felony." (C.T. 11:19-22.)

This Answer also alleged as a separate and affirmative defense:

(a) the aforementioned exclusionary clause of the Supplemental Agreement;

(b) that at the time of his death the insured,

> "while under the influence of intoxicating liquor, was driving an automobile in violation of law or in neglect of duty imposed by law which act or neglect personally caused the bodily injury of Hugh Smith [the driver of the other car] and the bodily injury and death of Gloria Peck [the passenger therein]";

(c) "A contributing cause to the death of Lester A. Barker was his commission of or attempt to commit a felony". (C.T. 11:28-29:16.)

Petitioner contends that such allegations, being made on the knowledge of the Assistant Secretary and not on information and belief, are material allegations which as a matter of law and of public policy are binding upon respondents.

On December 21, 1962, by stipulation (C.T. 16-17), petitioner filed a First Amendment to Complaint (C.T. 18-30; 31-41) and all material allegations of the Complaint and the First Amendment thereto were deemed denied. (C.T. 17:6-10.)

On June 18, 1963, the deposition of Mr. Heston, then Assistant General Counsel of California-Western, was taken. With reference to this Answer, he then admitted that he did not know of his own knowledge: that Barker was under the influence of intoxicating liquor; that he was driving the auto-

mobile in violation of law or in neglect of any duty imposed by law; that this alleged violation of law or alleged neglect of duty caused the bodily injury and death of Gloria Peck, the passenger in the other car; that a contributing cause of the death of Lester A. Barker was his commission of a felony. (C.T. 43g:24-43l-19.)

Thereafter, on November 8, 1963, petitioner moved the Court to strike this Answer and the Separate and Affirmative Defense therein on the grounds:

(a) That Mr. Heston had impeached himself and the truth, veracity and verity of said Answer and the Separate and Affirmative Defense and the verification thereof;

(b) That if such defense was allowed to remain that respondents would be permitted to take advantage of their own wrong in violation of California Civil Code Sec. 3517; and,

(c) That pleading such defense was against the public policy of the State of California and denied to petitioner procedural and substantive due process of law under the State and Federal Constitutions. (C.T. 43a; 43b; 3-15; 43c:1-43j.)

The petitioner's motion was unsuccessful (C.T. 44-50), respondents amended their answer, set up (C.T. 46:28-47:6) as a separate and affirmative defense the exclusionary provisions concerning "commission of felony" and repeated, on information and belief, the allegations of the original Answer set forth in (b) and (c) *supra*, p. 16.

On April 27, 1964, Mr. Heston, then Chief Assistant General Counsel of California-Western, stated in a letter to petitioner's attorney (Pl. Ex. 13, R.T. 68) that Form 1551 (Pl. Ex. 15B, C.T. 66, R.T. 98)

> "is the contract document establishing *the accidental death benefit*" (emphasis added).

At the pre-trial conference, on July 6, 1964, petitioner renewed (C.T. 79:23-80:15) all the legal and constitutional contentions of her complaint, as amended (C.T. 61:24-62:10), and added two more:

(a) That to permit respondents to assert the separate and affirmative defenses was a violation of California Civil Code Section 3517: "No one can take advantage of his own wrong" (Appendix A, p. v *infra)* and (b) that Art. I. Sec. 16 of the California Constitution: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts shall ever be passed." (Appendix A, p. iii *infra.*) (C.T. 79:23-80:15.) Nevertheless, at trial, in October, 1964, respondent's counsel said in his opening statement:

> "Now the *distinction* between an *accidental death* and *death by accidental means is a fine distinction that finds ample support in legal precedent* construing insurance contracts of the type we have in issue here." (Emphasis added.) (R.T. 10:6-9.)

He further said that respondents were relying upon the defense "that Mr. Barker's death did not result directly and independently from all other sources by accidental means". (R.T. 12:4-6.)

Respondents' attorney also stated at that time that

> "the Court will find what we consider to be the pertinent policy provisions in a document identified as Exhibit B of the Second Amendment to the Complaint." (R.T. 11:26-12:2.)

This is Form 1551, Pl. Ex. 15-B (R.T. 98 and is reproduced at C.T. 66).

At trial, Mr. Marcus Gunn, Vice President and Chief Actuary of California Western at the time the Supplemental Agreement was negotiated by him with the Department of Veterans Affairs, testified that the distinction between "accidental death" and "death by accidental means" was known to him. (R.T. 112:7-20; 115:18-116:1.)

All petitioner's public policy arguments and constitutional objections were preserved but denied at trial. (R.T. 88:12-91:19; 141:9-153:4; 154:25-161:6; 180:11-217:11; 225:4-226:4; 240:10-255:12.) They were urged in Plaintiff's opening trial brief (C.T. 87-94, particularly at pp. 88, 90, 91, 92, 93), in plaintiff's reply trial brief (C.T. 97-111), in her objections to proposed findings of fact and conclusions of law (C.T. 115-118), and, in the request for special findings of fact and appropriate conclusions of law on all the constitutional issues raised theretofore (C.T. 118-119) as well as the issues of public policy. The trial Court either overruled all such objections, denied appropriate motions to strike, or, made contrary conclusions of law on such. (C.T. 125-126; Appendix C, pp. xxxix to xli *infra.*) Judgment (C.T. 112; Appendix C, pp.

xxxvi to xxxvii *infra*) was entered thereon and the trial Court's Memorandum Opinion said:

> "The Court . . . has concluded that plaintiff's arguments, while sincere and ingenious, are without merit." (Appendix B, p. xiv *infra.*)

(2) Federal Questions and Issues of Public Policy Were Raised Before the Court of Appeal and the Supreme Court of California and Passed Upon Adversely to Petitioner.

The public policy and constitutional issues were again urged in Appellant's Opening Brief (AOB:13, 14-16; 17-30; 35-62) and in Appellant's Reply Brief (ARB:8-9; 10-15; 15-21; 21-40; 40-41; 45-59).

The Court of Appeal of the State of California, Fifth Appellate District, summarily decided these public policy and constitutional issues against petitioner by saying:

> "Appellant asserts that the felony exclusion clause is not binding because it violates her constitutional rights and is against public policy. We have considered appellant's extensive arguments in this respect and deem them to be entirely without merit." (Appendix B, p. xxvi *infra.*)

They were again unsuccessfully urged before the Court of Appeal in Appellant's Petition for a Rehearing (PFRH:7-9; 12-17, cf. also 2-5; 4-7; 9-11; 11-12). Rehearing was denied, without opinion, on August 17, 1967.

The same public policy and constitutional issues were urged in Appellant's Petition for a Hearing by the Supreme Court of California (PSC:12-19:23-28; 29-31; See also, 31-33; 19-21; 21-23). The Supreme

Court of California, without opinion, denied a hearing on September 21, 1967 (Appendix B, p. xxxv *infra*).

These constitutional and public policy issues are the ones which petitioner now respectfully requests this Court to review.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. THE DECISION OF THE STATE COURT SOUGHT TO BE REVIEWED RAISES THE IMPORTANT QUESTION WHETHER THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS EMBODY OR BY A PROCESS OF ABSORPTION COMPRISE OR INCORPORATE THE CONSTITUTIONAL GUARANTEES OF THE RIGHT TO BE FREE FROM THE JUDICIAL EQUIVALENT OF LEGISLATIVE BILLS OF ATTAINDER AND PAINS AND PENALTIES, EX POST FACTO LAWS AND LAWS IMPAIRING THE OBLIGATION OF CONTRACTS. THIS IS A FEDERAL QUESTION OF SUBSTANCE AND OF VITAL IMPORTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

Only two cases, one in Colorado and one in Texas, have been found having a fact pattern where the insured, as in the instant case, was alone in his car at the time of the collision which caused his death. This raises important questions of causation in addition to substantial constitutional issues.

These two cases reached contrary results. Neither discussed the constitutional guarantees and due process issues raised by petitioner in the case at bar.

The latest, *Penn Mutual Life Insurance Company v. Lois P. Gibson* (1966) ..... Col. ....., 418 P 2d 50 granted recovery to the beneficiary of the double indemnity and disapproved the result and the reason-

ing of the Texas case *(Mainer v. American Hospital and Life Insurance Co.,* 371 S.W. 2d 717, Tex. Civ. Appeal 1963) saying at 418 P 2d 51-52:

> "In *Mainer* the court did not discuss whether it was a felony to drive while intoxicated and merely seemed to assume that it was because a death occurred. . . .
>
> We do choose to follow *Mainer* because it fails to dispose of the real issue as we view it, which is one of causation, for the policy wording expressly excludes double indemnity payments as applied to this fact situation *only* if the death results from the commission by the assured of an assault or felony. Concerning causation see *Union Central Life Ins. Co. v. Cofer,* 103 Ga. App. 355, 119 S.E.2d 281 (1961), Appleman on Insurance, Vol. 1, p. 630, and 29A Am. Jur., Insurance, Secs. 1186-87. *This is different than the type of broad clause that bars recovery when there has been 'any violation of laws' as is expressed in many policies.* (Emphasis added.)
>
> [1] In the instant case the insured's death is not the death of 'another' under C.R.S. '53, 40-2-10 [Appendix A, pp. x to xi *infra*]. And, the question of an assault under C.R.S. '53 40-2-11 [Appendix A, p. xi *infra*] is not involved since such was neither alleged nor was the requisite intent proved. The injury to Houck caused by the insured's acts is therefore left for our determination. This must, however, be viewed in the light of what happened to the deceased and not what happened to Houck.
>
> As to the insured, the event which caused his death, was his collision with another automobile

> which was precipitated by his wrongful (but non-felonious) acts of driving while intoxicated and operating his vehicle in a reckless manner. The fact that Houck was also injured is not what caused Gibson's death. *A fortiori* the death was not the result of a felony under the statute. And, this was a risk not excluded by the double indemnity provision of the policy."

Texas, through Penal Code, Art. 47 53-58 (Vol. 1, V.A.P.C., Appendix A, p. xi, *infra*) and Penal Code, Art. 802c (Vol. 2, V.A.P.C., Appendix A, pp. xi to xii, *infra*) had broadened the concept of a felony to include what, in California, would be a misdemeanor, and had also made punishable, as a felony, conduct which was *in fieri*.

The denial to petitioner of due process of law and the trespass upon her zones of constitutional immunity occurs because under California Penal Code Sec. 17 (Appendix A, p. viii, *infra*)

> "A felony is a crime which *is* punishable with death or by imprisonment in the state prison. *Every other crime is a misdemeanor.*" (Emphasis added.)

In the "Historical Note" on page thirty-nine (39) of West's Annotated California Codes, Penal Code, Sections 1 to 260, the following appears under Sec. 17:

> "In 1874, in the first sentence, in the statement that a felony is a crime which is *'or may be'* punishable with death, the quoted words *were deleted.*" (Emphasis added.)

Thus the legislative policy of California, since the 1873-74 Amendment, is that a "felony" can *not* be a crime which *"may be"* punishable by imprisonment in the state prison.

Therefore, when the California courts, in the case at bar, sought to pin the tag of a felon on Barker, who was alleged to have committed the conduct prohibited under California Vehicle Code Sec. 23101 (Appendix A, page x *infra*) which statute clearly provides that

> ". . . upon conviction thereof shall be punished by imprisonment in the state prison . . . *or in the county jail*".

the California Courts are, without a charge, a trial, or a conviction, labelling as the "commission of a felony" conduct which was *in fieri* and which if Barker had been duly convicted of under the constitutional guarantees "implicit in the concept of ordered liberty" (Mr. Justice Cardozo, in *Palko v. Connecticut* (1937), 302 U.S. 319, 325, 82 L. Ed. 288, 292, 58 S. Ct. 149) could have been a misdemeanor because it "may be" punishable by imprisonment "in the county jail". Such decision, therefore, constitutes a violation of the due process clauses of the Federal and State Constitutions, a violation of Art. I, Sec. 9 (3) and Art. I, Sec. 10 of the Constitution of the United States. (Appendix A, p. i, *infra.*) Such decision also violated due process of law, substantively and procedurally, under the provisions of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and under the provisions of

Art. I, Sec. 13 and Sec. 16 of the Constitution of California. (Appendix A, pp. i to iii, *infra.*)

The *punishment* imposed by California Vehicle Code Sec. 23101 (Appendix A, p. x, *infra*) may be valid and constitutional insofar as the *criminal law per se* is concerned. But when respondents seek by their own wrongs to use the label of "felony", therein contained, to divest a third party,—petitioner,—of her property rights under the Supplemental Agreement which contained no reference to California Vehicle Code Sec. 23101 (Appendix A, p. x, *infra*) they are seeking to impair the obligation of the contract entered into between the Department of Veterans Affairs and the insured, on the one hand, and the respondents, on the other. This is depriving petitioner of her property without due process of law and as to her is the *judicial equivalent* of a legislative bill of attainder or pains and penalties.

In *United States v. Brown* (1965) 381 U.S. 437, 441-462, 85 S. Ct. 1707, 1711-1722, 14 L. Ed. 2d 484, 487-499, by virtue of a statute, it was sought to punish Brown as if he were a communist, *there being no trial of that issue.* In the case at bar, by virtue of the provisions of California Vehicle Code, Sec. 23101 (Appendix A, p. x, *infra*) and the exclusionary provision in the policy it is sought to tag Barker with the label of "commission of a felony" *there being no trial of that issue.* This Court condemned the former as an unconstitutional bill of attainder. In the case at bar, there is *the judicial equivalent of a bill of attainder.*

Furthermore, in the instant case, respondents had not complied with the California Statutes and Administrative Code Sections, were seeking to gain an advantage by their own wrong and the insured was a member of a class of veterans for whom the legislature had made particular provision.

Finally, two attorneys have stated to petitioner's attorney and counsel that they have or know of cases "with absolutely the same factual situation" [or "where the factual situation is almost identical"].

B. THE ISSUES HERE ARE ALSO IMPORTANT BECAUSE THEY TOUCH AND VITALLY CONCERN A LARGE CLASS OF CALIFORNIA VETERANS, ECONOMICALLY, CONSTITUTIONALLY, AND SOCIALLY. THE SUPERVISORY POWERS OF THIS COURT SHOULD BE EXERCISED TO CHECK ANY EROSION OF THE BASIC CONCEPT OF THE SEPARATION OF POWERS WHICH MAY BE A THREAT TO THE TRADITIONAL FRAMEWORK OF ORDERED LIBERTY STRUCTURED UPON A SYSTEM OF CHECKS AND BALANCES.

1. The "Home Protection Plan" of insurance touches and concerns a large class of California veterans.

The "Home Protection Plan" of insurance was designed for California Veterans. They are a large and important class. (cf. *Patterson v. Lamb* (1946) 329 U.S. 539, 541, 91 L. Ed. 485, 486.)

The "Home Protection Plan" of insurance (Pl. Ex. 15A-1960; R.T. 53-56) has been described in *MacDonald v. California-Western States Life Ins. Co.* (1962), 203 CA 2d 440, 453-4, 21 Cal. Rptr. 659, 667 as follows:

"(1) Mr. and Mrs. MacDonald were actual parties to the insurance plan and not third party beneficiaries. The term 'third party beneficiary' refers to someone who is not a promisee. (Rest., Contracts, Sec. 133.)

Mr. and Mrs. MacDonald contracted with the department [of Veterans Affairs of the State of California] to finance the purchase of a home. The department required MacDonald to apply for life insurance, which he did. The insurance contract provides that the proceeds will be paid to the department and that the department will apply the proceeds to discharge the indebtedness of the MacDonalds (who were jointly liable on the home purchase agreement). The MacDonalds paid the premiums. It seems clear that they were parties to the bargain when it was originally negotiated, and they were promisees both of the insurance companies' promise to pay benefits and the department's promise to use the benefits to discharge the MacDonalds' debt. . . . After the death of MacDonald, the insurance companies' duty to pay for Mrs. MacDonald's benefit is unconditional, all of the other parties to the contract having fully performed."

These principles are applicable to the instant case. When Barker became a party to the Supplemental Agreement (which was an insurance "contract of adhesion" under the rule of *Stevens v. Fidelity and Casualty Ins. Co.* (1962) 58 C 2d 862, 882-884, 27 Cal. Rptr. 172, 184-186, 377 P 2d 284, 296-298), the rights of the petitioner to receive a double indemnity in the event of the insured's accidental death were

subject only to the condition subsequent (*Moody v. Amazon Insurance Co.* (1894), 52 Ohio St. 12, 38 N.E. 1011, 1012, cited in 5 Williston, Contracts, Sec. 667A (3rd Ed.); cf. *Semmes v. Hartford Ins. Co.* (1871) 13 Wall. 158, 161, 162, 20 L. Ed. 490-491) that there be the "commission of a felony" by the insured. In the *Moody* case, *supra* at p. 1012, the court said

> "Those clauses usually contained in policies of insurance which provide that the policy shall become void, or its operation defeated or suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing, or the omission to do some act, . . . are conditions subsequent, and matters of defense, which, together, with the breach, must be pleaded by the insurer to be available as a means of defeating a recovery on the policy; and the burden of establishing the defense, if controverted, is, of course, upon the party pleading it."

The exclusion permitted by the Supplemental Agreement was for the "commission of a felony". Respondents could have inserted an exclusionary provision which would have freed them from liability "for any loss sustained or contracted in consequence of the insured being intoxicated". (Calif. Ins. Code Sec. 10369.12; 10 Calif. Adm. Code Sec. 2232.41, Appendix A, pp. viii, v, *infra.*) Such they did not do. Respondents should not, either as a matter of law or as a matter of public policy, be permitted to enlarge their zone of immunity at the expense of the members of the class of California Veterans who are homeowners. To do such, would be a denial to petitioner of due process of law under the Fifth and Fourteenth

Amendments of the Constitution of the United States and under Article I, Sec. 13 and Sec. 16 of the Constitution of California.

There was not, nor could there be any "commission of a felony" in violation of California Vehicle Code Sec. 23101 (Appendix A, p. x, *infra*) prior to the collision. Prior to the collision, there was no injury nor death. After the collision, the insured, who is the alleged felon, was then dead. The constitutional error of the decisions of the California courts is that the "zone of exclusion" available to respondents has been enlarged (due, perhaps, to a belief that on today's crowded freeways even one *suspected* of being under the influence of intoxicating liquor should have his dependents and insurance beneficiaries deprived of all rights) at the expense of the violation of their constitutional rights to due process of law, substantively and procedurally, and to their right to be free from impairment of the obligation of contracts.

To tag the insured, Lester A. Barker, with the "commission of a felony", under the circumstances here, shocks the conscience not only of veterans and their dependents, but also those of the entire community. Each has been told since childhood that before one can be labelled a "felon" he is entitled to certain constitutional safeguards including *the right to be tried while alive* and present in the criminal court wherein he is on trial, on a valid charge, resulting in a conviction under constitutional safeguards, the entry of judgment thereon, and the imposition of a sentence according to law, after the allocution.

Here there was none of these. No charge. No trial of one who was alive and present "and tried in a courtroom presided over by a judge", *Rideau v. Louisiana* (1963) 373 U.S. 723, 727, 10 L. Ed. 2d 663, 665, 83 S Ct 1417. No representation by counsel. None of the constitutional safeguards afforded to one charged with a crime. No allocution. No sentence. Merely a finding by a trial court that the conduct of a man, dead at the time of trial, constituted a violation of California Vehicle Code Sec. 23101 (Appendix A, p. x, *infra*), and, therefore, was within the scope of the exclusionary provisions of the Supplemental Agreement, which was an insurance "contract of adhesion" concerning "commission of a felony."

The supervisory power of this Court should be exercised to prevent the inevitable confusion in the minds of ninety-eight percent (98%) of the people in California who are not members of the legal profession as well as the two percent (2%) who are. The failure to exercise such supervisory power could well enhance the lack of confidence, in these troubled times, in our traditional concepts of a system of ordered liberty. To equate the conduct of the insured here with that of the convicted murderer, rapist, arsonist, armed robber or burglar is something that the men and women of today's society can never understand. If the law is made for man and not man for the law, the law should respond to the felt needs of the times. If such needs demand discipline for those who drive on freeways while under the influence of intoxicating

liquor, but who die before the traditional processes and safeguards of the criminal law can be commenced, as well as discipline for the beneficiaries of their insurance contracts, let the legislature and the respondents establish exclusionary provisions for "any violation of law" which so provide. But, the Courts of California should not be permitted so to legislate. To permit such, strikes at the very root of our basic concept of the separation of powers.

C. THE RESPONDENTS SHOULD NOT BE PERMITTED TO TAKE ADVANTAGE OF THEIR OWN WRONGS TO DEPRIVE PETITIONER, AND, OTHER MEMBERS OF THE CLASS WHICH THE CALIFORNIA LEGISLATURE SOUGHT TO PROTECT, OF PROPERTY WITHOUT DUE PROCESS OF LAW, THEREBY PERMITTING RESPONDENTS TO INVADE THE ZONES OF FREEDOM GUARANTEED BY ART. I, SEC. 9(3) AND ART. I, SEC. 10 OF THE CONSTITUTION OF THE UNITED STATES AND BY ART. I, SECS. 13 AND 16 OF THE CONSTITUTION OF CALIFORNIA.

Three (3) of respondents' own wrongs of which they should not be permitted to take advantage are recited under Questions Presented, Third, (a), (b) and (c) *supra* pp. 6-8.

In addition, respondents wilfully failed to comply with California Insurance Code Section 10369.11 Appendix A, p. viii *infra*) and 10 California Administrative Code Sec. 2232.30 (Appendix A, p. iv *infra*) in that they failed to set forth in the Supplemental Agreement ". . . in the words, order, and under the captions of the Uniform provisions as set forth in Section . . . 2232.40" (Appendix A, p. iv *infra*) the

exclusionary provision which they wrongfully entitled "Commission of a felony". The grant of permission by the Legislature contained in Insurance Code Sec. 10369.11 (Appendix A, p. viii *infra*) was for an exclusionary provision to be captioned "Illegal Occupation". This respondents did not do. The Supplemental Agreement (Pl. Ex. 15C and 15E, first six (6) lines; C.T. 65, 69, R.T. 99, 100, 101) clearly provides for "an increased death benefit in case of death from any cause heretofore insured" and also provides "a benefit for accidental death". Therefore, the Supplemental Agreement does not come within the limitation of Section 10271 of the California Insurance Code (Appendix A, p. vii *infra*) and Section 106 of the California Insurance Code (Appendix A, p. vi *infra*) applies. The failure of the California courts to construe Insurance Code Sec. 106 and Insurance Code Sec. 10271 *in pari materia* constitutes not only a gross miscarriage of justice under Art. VI, Sec. 4½ (Appendix A, pp. iii to iv *infra*) but a denial to petitioner of due process and an invasion of her zone of freedom under Art. I, Sec. 9 (3) and Art. I, Sec. 10 of the Constitution of the United States and Art. I, Secs. 13 and 16 of the Constitution of California (Appendix A, pp. ii to iii *infra*). This should be constitutionally impermissible because of California Civil Code Sec. 3517 (Appendix A, p. v *infra*).

D. THE ADMISSION INTO EVIDENCE, WITHOUT PROPER OR SUFFICIENT FOUNDATION, OF DEFENDANTS' EXHIBIT C, CONSTITUTED A MISCARRIAGE OF JUSTICE UNDER ART. VI, SEC. 4½ [NOW ART. VI, SEC. 13] OF THE CONSTITUTION OF CALIFORNIA AND A DENIAL TO PETITIONER OF DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, AND, UNDER ART. I, SECS. 13 AND 16 OF THE CONSTITUTION OF CALIFORNIA.

In short, there was no proper foundation laid for Defendants' Exhibit C (R.T. 193, 217). *First,* because

> "No proper showing was made that any of the records were required to be kept by any law." *Pierce v. Patterson* (1942) 50 C.A. 2d 486, 491, 123 P. 2d 544, 547.

Second, because there was absent the foundation required by C.C.P. 1953f. (Appendix A, p. vi *infra.*)

McGowan v. City of Los Angeles (1950) 100 C.A. 2d 386, 390, 223 P. 2d 862;

Kostick v. Swain (1953) 116 C.A. 2d 187, 196-197, 253 P. 2d 531, 537;

Pruett v. Burr (1953) 118 C.A. 2d 188, 196-201, 257 P 2d 696-700;

Gough v. Security Trust & Savings Bank (1958) 162 C.A. 2d 90, 93-94, 327 P. 2d 555, 557-558; and

Third, because Exhibit C was *not* properly identified as an official document under C.C.P. Secs. 1918 (5), (6), 1920 and 1926. (Appendix A, pp. v to vi *infra.*)

See *City of Stockton v. Vote* (1926) 76 Cal. App. 369, 396, 244 Pac. 609, 619, cited in *Pruett v. Burr, supra,* at p. 200.

In *Pointer v. Texas* (1965) 380 U.S. 400, 13 L. Ed. 2d 928, 85 S.Ct. Rep. 1065 and *Douglas v. Alabama* (1965) 380 U.S. 415, 13 L. Ed. 2d 934, 85 S.Ct. Rep. 1074 there was absent the "circumstantial guarantee of trustworthiness" (3 Wigmore, Evidence, Sec. 1421 (2nd Ed. 1923) i.e., confrontation and the right to cross-examination) which would have authenticated the assertions in the writing under scrutiny. The same is true with reference to Defendants' Exhibit C. (Def. Ex. C, R.T. 193, 217.)

Then, too, there is the question of the unconstitutional use in *private litigation* of Defendants' Exhibit C which is not properly authenticated and is offered without sufficient or proper foundation. *City of Stockton v. Vote, supra.*

Finally, Mrs. Barker's flat denials (R.T. 261:16-262:1) that she had ever told Mr. Felion or Mr. Hershey (R.T. 242:23-25) that Mr. Barker had been drinking heavily, or, that he had fallen down two or three times earlier that evening, or that he did not feel well can, under the circumstances existing in the case at bar, be weighed against the testimony of Rod Felion (R.T. 243:12-17; 251:23-254:2) and Defendants' Exhibit D, second page (R.T. 245, 246) particularly where, as here, Mr. Felion changed his testimony substantially as to what Exhibit D purported to recite (R.T. 246:10-254:2).

CONCLUSION

This is an important case and this Court should exercise its supervisory powers for each of the reasons mentioned. By so doing the error of the California Courts can also be corrected.

At stake here is the opportunity and the obligation to reaffirm that law is the voice of the sovereign. The sovereign here should say to respondents: This you can not do because it arises from your own wrong. To permit you so to do would be to allow a corporation and not the sovereign to determine what constitutes "commission of a felony". This would be a subtle erosion of the zones of due process and of the constitutional guarantees which are reserved to petitioner and which cannot be diminished by respondents' contracts of adhesion.

The sovereign here should also say: There can be no "commission of a felony" by an individual even though he is alleged to be under the influence of intoxicating liquor when driving the wrong way on a freeway, unless that individual has been duly charged, tried while alive, in the presence of a judge, found guilty of a felony, been present at the allocution, and, given, under California law, a sentence in a state prison.

Then, and only then, will the law have concrete meaning to laymen and lawyers alike as a means of social control, whereby individuals' constitutional

guarantees are "implicit in the concept of ordered liberty".

It is respectfully submitted that Certiorari be granted to the Court below.

Dated, San Francisco, California,
December 11, 1967.

Respectfully submitted,
EWART LYTTON MERICA,
Attorney for Petitioner.

LEO M. O'CONNOR,
JOHN B. LEWIS,
Of Counsel.

(Appendices Follow)

Appendix A

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE CODE SECTIONS INVOLVED

Constitution of the United States

Art. I, Sec. 9(3):

> "3. No bill of attainder or ex post facto law shall be passed."

Art. I, Sec. 10(1):

> "1. No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of California

Art. I, Sec. 13:

> "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the

court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testified or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. [As amended November 6, 1934. Initiative measure.]"

Art. I, Sec. 16:

"No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed."

Art. VI, Sec. 4½ [Now Art. VI, Sec. 13]:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error com-

plained of has resulted in a miscarriage of justice. [New section adopted November 8, 1966.]"

California Administrative Code Sections

10 California Administrative Code, Sec. 2232.30:

"Optional Uniform Provision Requirements. No group disability policy subject to this article delivered or issued for delivery in this State shall contain provisions respecting any of the matters which are the subject of Sections 2232.31 to 2232.40, inclusive, *unless such provisions are set forth in the policy in accordance with the requirements of such sections, and in the words, order and under the captions of the uniform provisions as set forth in Sections* 2232.32, 2232.34, 2232.37, 2232.38, 2232.39, and *2232.40,* subject, however, to the 'General Instructions and Rules' of this article, provided, nevertheless, that the insurer may, at its option, subject to Section 2232.5 hereof, substitute for one or more of such provisions corresponding provisions of different wording approved by the commissioner, which are in each instance not less favorable in any respect to the policyholder, any individual insured, or any beneficiary . . . (Ins. C. 10369.1)" (Emphasis added.)

10 California Administrative Code, Sec. 2232.40:

"2232.40. Illegal Occupation or Commission of Felony. The insurer shall not be liable for any loss to which a contributing cause was the commission of or attempt to commit a felony by the person whose injury or sickness is the basis of claim or to which a contributing cause was such person's being engaged in an illegal occupation. (Ins. C. 10369.11)"

10 California Administrative Code, Sec. 2232.41:

"2232.41. Intoxicants and Narcotics. The insurer shall not be liable for any loss sustained or contracted in consequence of the person whose injury or sickness is the basis of claim being intoxicated or under the influence of any narcotic unless administered on the advice of a physician. (Ins. C. 10369.12)"

California Civil Code

"Sec. 3517. No one can take advantage of his own wrong."

California Code of Civil Procedure

C.C.P. Sec. 1918 [Proof of Official Acts and Documents Other Than Judicial Records]:

Other official documents may be proved as follows:

5. Acts of a county or municipal corporation of this state, or of any board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such county or corporation.

6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof.

C.C.P. Sec. 1920 [Entries in Official Books as Prima Facie Evidence]:

Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts therein stated.

C.C.P. Sec. 1926 [Entries made by Officers or Boards Prima Facie Evidence]:

An entry made by an officer or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

C.C.P. 1953f:

"Sec. 1953f. [Conditions governing competency.] A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testified to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."[1]

C.C.P. Sec. 1962(3):

"Whenever a party has by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;"[2]

California Insurance Code

"Sec. 106. Disability insurance. Disability insurance includes insurance appertaining to injury,

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1. [2]Neither California C.C.P. Sec. 1953f nor Sec. 1962(3) was in effect after January 1, 1967. Evidence Code Secs. 1270-1272 and 623, respectively, were substituted therefor. Evidence Code Sec. 12(b) provides that "a trial commenced before January 1, 1967, shall not be governed by" the new Evidence Code.

disablement or death resulting to the insured from accidents, and appertaining to disablements resulting to the insured from sickness. (Stats. 1935, c. 145, p. 501, Sec. 106.)"

"Sec. 10271. Applicability of chapter to life insurance annuity contracts. Except as provided in Section 10292, this chapter shall not apply to or in any way affect life insurance, endowment or annuity contracts or contracts supplemental thereto which contain *only such provisions relating to disability insurance as (a) provide additional benefits in case of death or dismemberment or loss of sight by accident* or as (b) operate to safeguard such contracts against lapse, or to give a special surrender value, or special benefit, or an annuity, in the event that the insured or annuitant shall become totally and permanently disabled as defined by the contract or supplemental contract. (Stats. 1935, c. 145, p. 643, Sec. 10271, as amended Stats. 1935, c. 308, p. 1044; Stats. 1951, c. 570, p. 1720, Sec. 3.)" (Emphasis added).

"Sec. 10369.1. Wording of policy provisions. Except as provided in Section 10323, no disability policy delivered or issued for delivery to any person in this State shall contain provisions respecting the matters set forth in Sections 10369.2 to 10369.12, inclusive, unless such provisions are in the words in which the same appear in such sections; provided, however, that the insurer may, at its option, use in lieu of any such provision a corresponding provision of different wording approved by the commissioner, which is not less favorable in any respect to the insured or the beneficiary. Any such provision contained in the policy shall be preceded individually by the appro-

priate caption appearing in each of such sections, or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve. (Added Stats. 1951, c. 570, p. 1729, Sec. 13.)"

"Sec. 10369.11. Illegal occupation. A disability policy may contain a provision in the form set forth herein.

Illegal Occupation: The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation. (Added Stats. 1951, c. 570, p. 1733, Sec. 13.)"

"Sec. 10369.12. Intoxicants; narcotics. A disability policy may contain a provision in the form set forth herein.

Intoxicants and Narcotics: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician. (Added Stats. 1951, c. 570, p. 1733, Sec. 13.)"

California Penal Code

"Sec. 6. Effect of code upon past offenses. No act or omission, commenced after twelve o'clock noon of the day on which this code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes, which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township

regulation, passed or adopted, under such statutes and in force when this code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this code had not been passed."

"Sec. 15. 'Crime' and 'public offense' defined. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust or profit in this state."

Sec. 16. Crimes, how divided. Crimes are divided into:

1. Felonies; and
2. Misdemeanors."

"Sec. 17. [Felony and misdemeanor defined: Alternative punishments: Commitment to Youth Authority.] A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after the judgment imposing a punishment other than imprisonment in the state prison. Where a court commits a defendant to the Youth

Authority upon conviction of a crime punishable, in the discretion of the court, by imprisonment in the state prison or fine or imprisonment in a county jail, the crime shall be deemed a misdemeanor. (Enacted 1872. As Amended Code Am. 1873-74, c. 196, p. 455, Sec. 1; Stats. 1947, c. 826, p. 1960, Sec. 1.)"

California Vehicle Code

"Sec. 23101. Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not less than 90 days nor more than one year and by fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000). (Stats. 1959, c. 3, p. 1707, Sec. 23101.)"

Colorado Revised Statutes 1963, Vol. 3

Sec. 40-2-10. Driving Under Influence—Death:

"Any person while under the influence of intoxicating liquor or of any exhilarating or stupefying drug, who caused the death of another by operating or driving any automobile, motorcycle or other motor vehicle in a reckless, negligent or careless manner, or with a wanton or reckless disregard of human life or safety, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the state peniten-

tiary for a period of not less than one year nor more than fourteen years."

(Source: L. 23, p. 256, Sec. 1; CSA, C. 48, Sec. 39; CRS 53, Sec. 40-2-10.)

Sec. 40-2-11. Driving Under Influence—Injury:

"Any person, while under the influence of intoxicating liquor or any exhilarating or stupefying drug, who inflicts a bodily injury upon another by operating or driving any automobile, motorcycle, or other motor vehicle in a reckless, negligent or careless manner, or with a wanton or reckless disregard of human life or safety, shall be deemed guilty of a felony and shall be punished by imprisonment in the state penitentiary for a period of not less than one year nor more than five years."

(Source: L. 23, p. 256, Sec. 2; CSA C. 48, Sec. 40; CRS 53, Sec. 40-2-11.)

Texas: Vernon's Annotated Penal Code

"Article 47. 53-58 Offenses.

An offense is an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this Code. *An offense which may*—not must—*be punishable by death or by confinement in the penitentiary is a felony;* every other offense is a misdemeanor. Felonies are either capital or not capital. An offense for which the highest penalty is death is a capital felony. Offenses are divided into felonies and misdemeanors." (Emphasis added.)

"Art. 802c. Punishment of intoxicated driver involved in accident or doing act otherwise felonious.

Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley or any other place within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, and while so driving and operating such automobile or other motor vehicle shall through accident or mistake do another act which if voluntarily done would be a felony, shall receive the punishment affixed to the felony actually committed."

Appendix B

MEMORANDUM OPINION OF JUDGE IRVING H. PERLUSS, JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO.

UNREPORTED MEMORANDUM OPINION.

In the Superior Court of the State of California in and for the County of Sacramento

No. 135,267

Rose L. Barker,

Plaintiff,

vs.

California-Western States Life Insurance Company, a corporation, et al.,

Defendants.

MEMORANDUM OPINION

This matter involves the interpretation and application of a life insurance contract which provided for additional benefits payable in the event that the insured's death resulted from external, violent, and accidental means. The particular clause of the contract with which we are concerned is the exclusion that provides that the insurer will ". . . not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony".

The plaintiff herein is the widow of an individual who was insured under this insurance contract at the time of his death on February 7, 1960, his death being caused by injuries sustained in an automobile accident on the Elvas Freeway, Sacramento County. It appears that the deceased had been driving on the wrong side of the freeway and collided with another car seriously injuring the driver of the other car and killing a passenger in the other car.

There was a chain of evidence admitted by the Court over vigorous objection which indicated that the deceased's blood alcohol was .18% by weight, which has been held to be sufficient to establish the fact of intoxication. (See *People v. Duroncelay* (1957) 48 Cal. 2d 766.) Defendants contend that this circumstance, together with the unfortunate accident in which one innocent victim was seriously injured and another was killed, was sufficient to bring the deceased within the provision of section 23101 of the Vehicle Code, the so-called "Felony Drunk Driving Statute".[1]

The Court agrees with defendants' position and has concluded that plaintiff's arguments, while sincere and ingenious, are without merit.

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[1] "23101. FELONY DRUNK DRIVING. Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not less than 90 days nor more than one year and by fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000)."

It appears well established that while a conviction under section 23101 could be a misdemeanor or a felony dependent upon the punishment imposed, prior to the imposition of the judgment the charge stands as a felony. (See *Doble v. Superior Court* (1925), 197 Cal. 556, 576-577.) Moreover, a number of cases from other jurisdictions indicate that in a situation of this type lesser proof is required than that which would be necessary to convict the insured on a felony charge. (See 86 A.L.R. 2d 443, 454 *et seq.*)

Directly in point here is the case of *Mainer v. American Hospital and Life Insurance Company* (1963 Tex. Ct. Civ. App.) 371 S.W. 2d 717 where, in a case with facts strikingly comparable to those of the instant matter, it was held that the insured sustained his death while committing a felony within the meaning of the exclusion clause of the insurance policy there involved.

Plaintiff's motions to strike are denied. Judgment will be entered for the defendants whose counsel is requested to prepare appropriate findings of fact and conclusions of law and a proposed judgment.

Dated: July 28, 1965.

/s/ Irving H. Perluss
Judge of the Superior Court

Filed July 28, 1965,
C. C. LaRue, Clerk.

OPINION OF THE COURT OF APPEAL, STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT
Reported at 252 A.C.A. 832, 61 Cal. Reptr. 595

In the Court of Appeal
State of California
Fifth Appellate District

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5 Civil No. 766

Rose L. Barker,
Plaintiff and Appellant,
vs.
California-Western States Life Insurance Company, et al.,
Defendants and Respondents.

Opinion

Respondents for several years prior to the institution of this action had been writing ordinary group life insurance on the lives of California veterans insured under the commonly called "Cal-Vet" loan program, pursuant to certain agreements which they entered into with the California Department of Veterans Affairs. By supplemental agreement dated January 20, 1960, effective February 1, 1960, the respondents agreed to increase the life insurance benefits on the lives of the insured veterans; they also agreed to provide additional indemnity in the event

of accidental death or death by accidental means. However, the supplemental policy which was submitted to and approved by the state Insurance Commissioner contained the following limiting provision with regard to the additional benefit for accidental death:

> "*Commission of a Felony:* The company shall not be liable for any loss to which a contributing cause was the insured's commission or attempt to commit a felony."

Appellant's husband, Lester A. Barker, a California veteran, was killed during the early morning hours of February 7, 1960, as the result of a head-on collision on Elvas Freeway at the Arden intersection in Sacramento. The collision, which resulted in the death of another person as well, occurred between an automobile which Barker was driving north on the southbound lanes of the highway (on the wrong side of the freeway), and a vehicle which was traveling south in the southbound lanes. Shortly before the accident appellant and her husband had been guests at a party at the Eagle's Hall in Sacramento, where Barker had been drinking heavily and had fallen several times. After the accident a blood test of Barker's blood taken from his body during the autopsy indicated that it contained .18% alcohol by weight.

At the time of his death Barker's life was insured under the "Cal-Vet" loan program. He was also insured under the supplemental agreement of February 20, 1960, although he had not yet received his copy

of the policy and apparently was not aware of the existence of the additional insurance. After Barker's death respondents paid appellant, as sole beneficiary, all life insurance benefits to which she was entitled under their insurance policies, but refused to pay the additional benefit for death resulting by accidental means amounting to approximately $12,859.06. Accordingly, appellant instituted this action in the Superior Court of Sacramento County for breach of contract and declaratory relief. The cause was tried before the court sitting without a jury, and at the conclusion of the trial judgment was entered by the court in favor of respondents. The court expressly found that Barker's death was caused by accidental means, but concluded that appellant was not entitled to recover the additional indemnity benefit because a contributing cause to the insured's death was the insured's commission of a felony. Appellant appeals from this judgment.

Respondents initially contended (by way of affirmative defenses) that they were not liable to appellant under the supplemental policy because Barker's death did not result directly and independently of all other causes from accidental means, and that a contributing cause to his death was the commission of or the attempt to commit a felony. Appellant therefore spends considerable time and effort in her brief in pointing to certain inconsistencies in the policy (and to a letter written by an agent of respondent California-Western States Life Insurance Company) in order to demonstrate that the decedent Leslie A. Barker was insured

for accidental death as well as for death resulting by accidental means. However, during the trial respondents abandoned the defense that Barker's death did not result by accidental means and do not assert the defense in this appeal. Thus, the only questions presented herein are:

I Is felony drunk driving as defined in Vehicle Code section 23101 a felony within the exclusion clause contained in the supplemental policy?

II If so, is a conviction essential before the felony is deemed committed under the exclusion clause?

III Is the exclusion clause invalid or otherwise unenforceable against this appellant?

IV Assuming that the exclusion clause is valid and enforceable, is there sufficient evidence in the record to support the trial court's finding and conclusion of law that the decedent Leslie A. Barker had committed a felony prior to his death, and that this felony was a contributing cause thereto?

I

Vehicle Code section 23101 defines felony drunk driving as follows:

"Any person who, while under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony and

> upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not less than 90 days nor more than one year and by fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000)."

Hence, it is clear that under this section any person who (1) while under the influence of intoxicating liquor and while driving a vehicle (2) does any act forbidden by law or neglects any duty (3) which results in the death or injury of someone else commits a felony. This is so because the section categorizes the offense as a felony and provides that upon conviction thereof the offender shall be punished by imprisonment in the state prison or by imprisonment in the county jail. It is settled that if an offense is punishable either as a felony (by imprisonment in the state prison) or as a misdemeanor (by imprisonment in the county jail), it is deemed a felony for all purposes up to the imposition of sentence (Penal Code section 17; *People v. Banks,* 53 Cal. 2d 370; *People v. Williams,* 27 Cal. 2d 220; *People v. Lippner,* 219 Cal. 395; *Doble v. Superior Court,* 197 Cal. 556).

Appellant asserts, however, that this is not and cannot be so as to an offense punishable by imprisonment in the county jail in the absence of a conviction. In fact, she asserts that the common law background of the word "felony" and the historical background of Penal Code section 17 unequivocally indicate that a felony is a crime which "must" be punishable by im-

prisonment in the state prison, and does not and cannot include a crime which merely "may" be punishable in the discretion of the court in the state prison. Consequently, she concludes that since the felony exclusion clause contained in the policy does not specifically refer to Vehicle Code section 23101, and since this section provides for an alternative penalty, the decedent Barker did not and could not have committed a felony because he was not charged with a felony nor convicted after a charge, nor was he sentenced to a state prison after conviction.

Although it may be true (as appellant contends) that the decisions holding that an offense punishable either by imprisonment in the state prison or by imprisonment in the county jail is deemed a felony for all purposes up to the imposition of sentence are cases in which the defendant had been convicted, they do not by implication or otherwise require a conviction as an essential factor. To the contrary, in *Doble v. Superior Court, supra,* 197 Cal. 556, the offense was punishable as a felony or misdemeanor, depending upon the imposition of sentence, and no charge had been lodged against defendant within the period prescribed by the statute of limitations for misdemeanors. The court held, however, that the statute of limitations relating to felonies was applicable because the offense was treated as a felony for all purposes up to the imposition of sentence. Consequently, by implication at least, the court held that such an offense is to be treated as a felony even prior to the lodging of a charge or to a conviction. Moreover, as we have stated,

Vehicle Code section 23101 itself categorizes the offense a felony, and it is the *actual* imposition of a jail sentence that reduces it from a felony to a misdemeanor *(People v. Trimble,* 18 Cal.App.2d 350). If the Legislature may classify offenses as felonies or misdemeanors as it chooses (as it has done in Penal Code section 17 by the nature and imposition of the sentence), it necessarily follows that it may classify a particular offense as a felony up to the actual imposition of sentence as it has done in Vehicle Code section 23101. Thus, the rule articulated in *People v. Trimble, supra,* 18 Cal.App.2d 350, that an offense categorized by the Legislature as a felony is reduced to a misdemeanor if a misdemeanor sentence is imposed, should not and must not be extended to a case where no sentence has been imposed for whatever reason (See 11 So.Cal.L.Rev. 298). Accordingly, we conclude that the offense described in section 23101 must be deemed a felony for all purposes (including the determination of the contractual rights of the parties under an insurance policy) unless the offense was actually reduced to a misdemeanor after conviction by the imposition of a fine or by imprisonment in the county jail.

II

Appellant's second contention that decedent, Leslie A. Barker, did not and could not have committed a felony which contributed to his death is simply that there can be no "commission of a felony" until there has been a conviction thereof. However, we are again impelled to disagree. Significantly, the exclusion clause

does *not* state that the insurance company shall not be liable for any loss to which a contributing cause was the insured's *conviction* of a felony. It states simply that the company shall not be liable for any loss to which a contributing cause was the insured's *commission* of or *attempt* to commit a felony. It is manifest that the term "commit" (which means to do; to effect or perpetrate) is not synonymous with, nor does it have the same meaning as, the term "convict" (which means to prove or find guilty of a criminal charge [Webster's Dictionary; Black's Law Dictionary]). Also, significantly, the exclusion clause relates primarily to a death benefit and obviously contemplates the death of the insured while he is engaged in the act of committing or attempting to commit a felony, or shortly thereafter. Hence, it is apparent that such an exclusion clause would have little if any meaning if a conviction were also required.

It is of course true that ambiguous clauses in insurance policies are to be interpreted against the insurer. However, there is no ambiguity in this clause, and we conclude that a reasonable person of average intelligence, seeking insurance of the nature provided in the policy, who read the clause would have understood it to mean that the insurance carrier was relieved of liability if the conduct contributing to the insured's death was deemed felonious under the laws of this state.

III

Appellant's remaining contentions are that the exclusion clause is invalid and is unenforceable against

appellant. For example, she asserts that if such conduct as that specified in Vehicle Code Section 23101 is a felony, it would be possible for an insurance company to subserve its own interest by prevailing on the Legislature to adopt new laws from time to time which would increase the area of prohibited conduct, thereby minimizing its risk under a policy which it had already issued. She concludes that it is the evil tendency (and not the actual result) which is the test of illegality. This assertion, however, borders on the absurd. It assumes that an insurance company could successfully prevail on a state legislature to declare certain specified conduct felonious, thereby affecting every citizen of the state, merely to assist the insurance company to avoid its contractual commitments.

Appellant argues next that respondents could have protected themselves by excluding losses sustained in consequence of the insured's being intoxicated, and since they did not choose to use this language they are now precluded from using a felony clause to accomplish the same purpose. It is difficult to understand why, if respondents could have protected themselves from liability from a death resulting from or contributed to by the insured's mere intoxication (as appellant apparently admits), it is not and should not be protected by a more restrictive felony clause which in addition to intoxication also requires the insured to do a forbidden act while driving a vehicle which causes injury or death to someone else. In other words, it is clear that the respondents could have increased the excluded risks, thereby minimizing the area of lia-

bility, by inserting a simple intoxication clause, and it follows that it should be protected under a felony clause which provides greater coverage for the policyholder by narrowing the area of exclusion.

Third, she contends that the felony clause is invalid because it does not conform with the precise wording of section 10369.11 of the Insurance Code; i.e., it does not contain a caption, nor does it refer to an illegal occupation. This argument, however, is unavailable to appellant because the section applies only to a disability policy, and then only if it is not supplemental to a life insurance policy. As we have indicated, the main policy under which Barker was insured in the instant case was ordinary life insurance, and the supplemental policy merely increased the life insurance benefits and added an additional benefit in the event of death by accidental means.[1]

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[1]Section 10369.11 is a part of Chapter 4 of Division 2 of the Insurance Code entitled "Standard Provisions and Disability Policies." Section 10271, which is also a part of Chapter 4, reads as follows:

> "Except as provided in Section 10292, this chapter shall not apply to or in any way affect life insurance, endowment or annuity contracts *or contracts supplemental thereto which contain only such provisions relating to disability insurance as (a) provide additional benefits in case of death or dismemberment or loss of sight by accident* or as (b) operate to safeguard such contracts against lapse, or to give a special surrender value, or special benefit, or an annuity, in the event that the insured or annuitant shall become totally and permanently disabled as defined by the contract or supplemental contract." (Emphasis added.)

Section 10292 (referred to in section 10271) is not helpful to appellant, because it simply provides that a supplemental contract of the kind involved in this case shall not be issued or delivered until a copy of the form thereof is submitted to, and approved by, the Commissioner (which was done in the instant case), and that the Commissioner may make reasonable rules and regulations con-

Appellant asserts that the felony exclusion clause is not binding, because it violates her constitutional rights and is against public policy. We have considered appellant's extensive arguments in this respect and deem them to be entirely without merit. In fact, we see no reason why an insurance company may not limit its risk under a policy so as to exclude felonious conduct. To the contrary, by legislative declaration, in this state at least, such clauses are not deemed to be against public policy.[2] Moreover, similar clauses have been upheld by the courts of our sister states (*Mainer v. American Hospital and Life Insurance Co.*, 271 S.W.2d 717; *Redman v. Western & Southern Life Ins. Co.*, 187 S.W.2d 842; *Lubianez v. Metropolitan Life Ins. Co.*, 79 N.E.2d 876). In *Mainer* the insured was operating an automobile under the influence of alcohol while driving on the wrong side of a limited access, divided highway. He collided head-on with an oncoming car, causing his own death and that of the

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cerning the provisions in the contract as are necessary to enforce such standards prescribed by Chapter 4 as he (the Commissioner) finds to be applicable to such contracts. Our independent research indicates that the Insurance Commissioner has not adopted any rules and regulations under this section, and thus it is clear that section 10369.11 is inapplicable to the supplemental contract. Moreover, the Insurance Commissioner authorized the issuance of the supplemental policy relating to the additional death benefit for death resulting by accidental means, and it must be assumed that he also approved the wording of the felony exclusion clause therein.

Significantly, the Insurance Commissioner marked that portion of the supplemental policy relating to additional life insurance benefits as follows:

"Return to Sender
Filing or Approval
Not Required by Law."

[2]See Insurance Code section 10369.11 relating to disability insurance.

other driver. The policy contained a supplemental benefit provision for accidental death, with an exclusion if the death of the insured resulted from committing a felony. In denying coverage under this exclusion clause, the court not only upheld its validity, but obviously found that a conviction was not a prerequisite to the commission of a felony.

Finally, appellant argues that in any event the exclusion clause is unenforceable because respondents never notified Barker that the accidental death amendment was in effect and did not furnish him with a copy of the policy. Accordingly, she argues that she comes within the rule that if the terms of a purported exclusionary provision of an insurance policy are not called to the attention of the person who receives it, he is not bound thereby (*Steven v. Fidelity & Casualty Co.*, 58 Cal.2d 862, and *Raulet v. Northwestern Etc. Ins. Co.*, 157 Cal. 213).

Significantly, the supplemental insurance policy in the instant case was not negotiated or purchased directly by Barker from the respondents. It was negotiated and purchased by the Department of Veterans Affairs for the benefit of California veterans who were insured under the "Cal-Vet" loan program, and who would thereafter agree to pay the additional premium. Consequently, unlike *Steven* and *Raulet*, this is not a case where an insured who was seeking certain specified insurance coverage negotiated and purchased the insurance without having his attention directed to the fact that the policy contained certain exclusions which substantially limited or affected the coverage which

he was seeking to purchase. Moreover, it is apparent that the parties who negotiated the contract (the Department of Veterans Affairs and respondents) contemplated a reasonable delay between the effective date of the additional coverage and the date when all veterans already insured under the program would be notified and would secure their copies of the policy.[3] On the one side of the coin appellant asserts that she may claim the benefits of a supplemental insurance policy which was not negotiated or directly purchased by her husband even though his death occurred only seven days after the policy's effective date (and well within the period that he could have refused the benefits of the new policy and secured a refund of any premiums charged against him), and even though he was apparently unaware of the additional coverage; this claim is undisputed by respondents. On the other side of the coin appellant claims that she may reject a valid exclusionary clause or limitation which is an integral part of this same policy simply because the insured had not been notified of the policy and was unaware of its contents. It is this later claim which

[3]This is indicated by the nature of the coverage and by the contract itself. The coverage is group insurance for the numerous veterans insured under the "Cal-Vet" program. In this respect, the supplemental contract provides that the monthly premium charged for the increased amount of life insurance and accidental death due for any month between February 1st and May 1st, 1960, could be paid out of the reserve accumulated by the insurance company, and at the option of the department later charged against the respective accounts of the contract holders who were covered by such benefits during such period. Furthermore, the contract holders (the insured veterans) were given a period of 90 days to reject the benefits of the new coverage, and if they did so by notifying the department in writing, all premiums collected by the company for that period would be refunded.

respondents reject, and which we find to be not only unreasonable but completely untenable.

IV

It is undisputed that the decedent Leslie A. Barker was driving an automobile on the wrong side of a divided highway, resulting in an accident which also killed another person. In contending that respondents failed to establish their defense that Barker had committed a felony under Vehicle Code section 23101, however, appellant argues that there is not sufficient admissible evidence to sustain the trial court's finding of fact that at the time of the accident Barker was under the influence of intoxicating liquor, an essential element to the commission of the crime. She further contends that respondents had the burden of proof on this issue and failed to sustain this burden by a preponderance of the evidence.

It is the rule on appeal that an appellate court does not weigh the evidence or judge the credibility of witnesses in order to determine whether the party having the burden of proof has established his proof by a preponderance of the evidence. To the contrary, the appellate court must view the evidence in the light most favorable to respondent, indulging all intendments and reasonable inferences in his favor, and the court may not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof (*Berniker v. Berniker,* 30 Cal.2d 439). Accordingly, we conclude that there is substantial evidence in the record to support the trial court's

decision on the issue of Barker's intoxication. First, he was driving his vehicle on the wrong side of a divided highway, indicating that he did not have full control of his faculties. Second, shortly before the accident he attended a party at the Eagle's Hall in Sacramento where (according to appellant's own statements) he had been drinking heavily and had fallen several times. Third, Barker's blood alcohol was .18% by weight, and a qualified criminologist testified that any person whose blood contained this quantity of alcohol would be under its influence.

Appellant also asserts that the written report of the Bureau of Criminal Identification and Investigation of the state of California, containing the result of the blood alcohol test which was made in its laboratory on Barker's blood, was improperly introduced into evidence because respondents failed to lay an adequate foundation. However, this assertion is not supported by the record. In fact, the Supreme Court has approved the admission of a report of a blood test under remarkably similar circumstances (*Nichols v. McCoy,* 38 Cal.2d 447).

In the instant case the record shows the following. The deputy coroner who investigated the accident testified that he arrived at the scene shortly after the accident occurred and that he made the identification of Barker's body by examining decedent's personal effects and from statements made by appellant. He further testified that he removed the body and delivered it to the county morgue. Dr. Wallace, the autopsy surgeon, testified that he followed the routine

practice generally followed in such cases when he made the autopsy of Barker's body. Specifically, he testified that he made the autopsy on the body identified to him as decedent's (apparently by the deputy coroner who investigated the accident and delivered the body); that he removed a quantity of blood from the body and placed it in a bottle; that he placed the bottle in an envelope and in turn placed the envelope on a table in the autopsy room; and that before doing so he indicated on the envelope that it contained Barker's blood and identified it with his own initials. A second deputy coroner testified that he picked up the envelope from the refrigerator in the autopsy room and delivered it to the laboratory of the Bureau of Criminal Identification and Investigation. He further testified that before doing so he filled out a receipt which was signed by the laboratory assistant to whom he delivered the envelope, stating that Barker's blood had been delivered to the laboratory for a blood alcohol test. David Q. Burd, a criminologist employed in the laboratory of the Bureau of Criminal Identification and Investigation for approximately 23 years, identified the bureau's report of the blood test made on Barker's blood which was introduced into evidence. Specifically, he explained in detail the customary manner in which blood was analyzed in the laboratory for blood alcoholic content. He then identified the report which was introduced into evidence as a copy of the official record maintained in the laboratory of the Bureau of Criminal Identification and Investigation, and testified in detail as to its mode of preparation. In this connection, he stated that al-

though the office secretaries filled in the preliminary information, it was customary and routine practice for the chemist who made the test to remove the bottle containing the blood sample from the sealed envelope and to make all entries concerning the result of the test in the official record in his own handwriting. He also testified that the blood alcohol test on Barker's blood had been made by a Mr. Green (then deceased), and that the entries in the record were made in his handwriting in the routine and customary manner.

Appellant assails the testimony of Dr. Wallace because he stated that he took the blood sample from a body identified to him as the body of Leslie A. Barker. Although this testimony is arguably hearsay (as appellant asserts), it is buttressed by sufficient circumstantial evidence of the routine business practice of the coroner's office to warrant its admission. In *Nichols v. McCoy, supra,* 38 Cal.2d 447, the embalmer who took the sample of the blood also testified that he was informed of the name of the decedent at the time of the embalming and again the next day when his employer had him sign the embalming certification. Moreover, in the instant case appellant did not object to Dr. Wallace's testimony on the ground of hearsay, and it is settled that hearsay evidence admitted without objection is sufficient to support a finding.[4]

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[4]Appellant moved to strike Dr. Wallace's testimony on the ground that his statement relating to the identity of the body was based on hearsay long after the doctor had testified and during the testimony of Mr. Burd. At that time he explained to the court

Appellant also contends that there was no showing that Mr. Green who made the blood test for alcoholic content on Barker's blood was qualified to make such a test and to express an opinion. Mr. Burd testified, however, that Mr. Green was a chemist employed in the laboratory of the Bureau of Criminal Identification and Investigation of the state of California, and that he had made numerous blood tests to determine alcoholic content. Thus, it is manifest that there was sufficient evidence for the court to find that the test on Barker's blood had been made by a qualified employee of the Bureau of Criminal Identification and Investigation, and we do not believe that it abused its discretion in this respect.

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that he did not timely object because he had been lulled into a false sense of confidence by the series of constitutional objections which he had made to the doctor's entire line of testimony. Be that as it may, the record clearly indicates that respondents' counsel called the court's and appellant's attention to the fact that appellant's objections were limited to constitutional questions and did not include the hearsay objection. In fact, the record indicates that the following transpired:

"Mr. Worden: That objection, however, your Honor, is limited to the constitutional matters that we covered and the privilege matters that we covered; I am correct there? In other words, you are not reserving to the plaintiff an opportunity to object to the question on some other basis, other than the ones that have been argued?

The Court: No. He is objecting on the matters which he has objected to and set forth those objections very, very well and in great detail. That's as far as we go.

Mr. Worden: I wouldn't want to be faced with an objection that it is hearsay at a later date.

The Court: Oh, no, no, no, any objections as to form or anything else now, as to competency, these must be made, this is understood; but we are talking about these matters to which Mr. Merica addressed himself before the recess."

Under these circumstances, appellant waived any objection she may have had on the ground of hearsay, and it is apparent that her motion to strike was not timely made (*Powers v. Board of Public Works*, 216 Cal. 546).

Appellant's final thrust that respondents' use of a blood sample taken at the coroner's autopsy was improper because the insurance policy simply authorized respondents to examine the body and to make an autopsy, but said nothing about an autopsy made by a governmental instrumentality is so devoid of merit that no further comment thereon is necessary.

The judgment is affirmed.

/s/ Gargano, J.

We concur:

/s/ Conley, P.J.

/s/ Stone, J.

Filed July 24, 1967,
James G. Huggins, Clerk.

Order Due
September 22, 1967

In the Supreme Court of the State of California

In Bank

Rose L. Barker,
Plaintiff and Appellant,
vs.
California-Western States Life Insurance Company, et al.,
Defendants and Respondents.

ORDER DENYING HEARING

After Judgment by the Court of Appeal
5th District, Division ....., Civil No. 766

Appellant's petition for hearing DENIED.

Peters, Acting Chief Justice.

Filed Sept. 21, 1967,
William I. Sullivan, Clerk.

Appendix C

JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the Superior Court of the State of California
in and for the County of Sacramento

No. 135,267

Rose L. Barker,
Plaintiff,
vs.
California-Western States Life Insurance Company, a corporation, et al.,
Defendants.

JUDGMENT

This case was tried on October 29 and 30, 1964, before the Court sitting without a jury. Ewart Lytton Merica appeared for the plaintiff and Richard G. Worden of Downey, Brand, Seymour & Rohwer appeared for defendants. The Court heard the evidence and took the case under submission. The Court having considered the matter and having filed its Findings of Fact nad Conclusions of Law and having directed that Judgment be entered in accordance therewith:

It Is Hereby Ordered, Adjudged And Decreed:

1. That plaintiff recover nothing from defendant.

2. That defendant recover its costs against plaintiff in the amount of $212.45.

Dated: OCT 8 1965

Irving H. Perluss,
Judge of the Superior Court

Filed October 8, 1965,
W. N. Durley, County Clerk.

In the Superior Court of the State of California in and for the County of Sacramento

No. 135,267

Rose L. Barker,
Plaintiff,
vs.
California-Western States Life Insurance Company, a corporation, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried on October 29 and 30, 1964, before the Court sitting without a jury. Ewart Lytton Merica appeared for plaintiff and Richard G. Worden of Downey, Brand, Seymour & Rohwer for defendants. The Court heard the evidence and took the case under submission. Having considered the matter, the Court renders its decision and finds the facts and states its conclusions as follows:

Findings Of Fact

1. The defendants write group life insurance on the lives of California veterans who are purchasing homes and farms from the California Department of Veterans Affairs under the commonly called "Cal Vet" loan program. The life insurance contracts written by defendants are between the Department of Veterans Affairs of the State of California and the

defendants. The coverage thereunder includes ordinary life insurance payable upon death, and, additional indemnity in the event that the death of the insured "resulted directly and independently of all other causes from external, violent and accidental means of which there is visible contusion or wound on the body . . . and that such death occurred within 90 days after sustaining such injury". Such additional indemnity is provided for in a Supplemental Agreement.

2. The said Supplemental Agreement relating to the additional benefits in the event of death by external, violent and accidental means provides, *inter alia:*

> "*Commission of Felony:* The Company shall not be liable for any loss to which a contributing cause was the insured's commission of . . . a felony".

This Supplemental Agreement was entered into January 20, 1960, between the Department of Veterans' Affairs of the State of California and the defendants. Lester A. Barker, the plaintiff's late husband, was without his knowledge, insured under this Supplemental Agreement at the time of his death. The plaintiff was the beneficiary of such said Supplemental Agreement.

3. That the said Lester A. Barker was killed on February 7, 1960, in a collision on the Elvas Freeway at the Arden interchange, a public highway in Sacramento County, California, between an automobile driven by Hugh Smith and one driven by Lester A.

Barker; that the death of Lester A. Barker resulted from the collision; that the body of Lester A. Barker, after the collision, had visible injuries, contusions or wounds thereon resulting from the collision and that the death of Lester A. Barker resulted directly and independently from all other causes from external, violent and accidental means of which there were visible contusions or wounds upon the body; that such death occurred within 90 days after such collision and after sustaining such contusions or wounds.

4. At the time of the accident Barker was driving an automobile on the wrong side of the Freeway (he was traveling north in the south bound lanes). The Freeway is a highway divided into two roadways by means of a dividing section of not less than two feet in width. As set forth in Finding 3 above, Barker's car collided with one driven by one Hugh Smith. Mr. Smith was seriously injured and his passenger was killed. At the time of the accident Barker was under the influence of intoxicating liquor.

Conclusions Of Law

1. Plaintiff is not entitled to recover the additional indemnity benefits provided for in the Supplemental Agreement of the insurance contract because a contributing cause to the insured's death was the insured's commission of a felony.

2. The felony exclusion clause in the Supplemental Agreement of the insurance contract:

(a) Does not violate and is not contrary to the provisions of Sections 6, 15, 16 and 17 of the Penal Code of the State of California;

(b) Does not violate and is not contrary to the United States Constitution Article I, Section 9 (3); Article I, Section 10 thereof; and, the Fourteenth Amendment to the United States Constitution;

(c) Does not constitute a denial to plaintiff of substantive and procedural due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and, under Article I, Section 13 and Article I, Section 16 of the Constitution of the State of California.

(d) Does not violate and is not contrary to the public policy of the State of California and the United States of America.

3. The defense made by the defendants herein based on the felony exclusion clause, on the record herein, and under the circumstances here presented, was not, and is not now, contrary to the public policy of the State of California and the United States of America.

4. Plaintiff is entitled to recover nothing from defendants by virtue of this action.

5. Defendants are entitled to recover their costs from plaintiff.

6. Defendants are entitled to a judgment against plaintiff decreeing that plaintiff take nothing by her action and that defendants recover their costs of suit.

Dated: OCT 8 1965

Irving H. Perluss,
Judge of the Superior Court

Filed, October 8, 1965,
W. N. Durley, Clerk.